

APR 2002

TERM

STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS  
(Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.)

---

ROBERT and PATRICIA STOKES,

Plaintiffs-Appellants,  
Cross Appellees

v

Supreme Court Docket No. 119074

Court of Appeals No. No. 216334

MILLEN ROOFING COMPANY,

Defendant-Appellee  
Cross Appellant.

Lower Case No. 94-3123-NZ  
Hon. Donald A. Johnston, III

---

**BUREAU OF COMMERCIAL SERVICES BRIEF *AMICUS CURIAE***

**ORAL ARGUMENT REQUESTED<sup>1</sup>**

JENNIFER M. GRANHOLM  
Attorney General

Thomas L. Casey (P24215)  
Solicitor General  
Counsel of Record

Michael A. Lockman (P16748)  
Assistant Attorney General  
Attorneys for *Amicus Curiae*  
Cadillac Place  
3030 W. Grand Boulevard, Suite 10-200  
(313) 456-0040

Dated: January 30, 2002

RECEIVED

FFB 1 2002

CLERK SUPREME COURT

---

<sup>1</sup> Opportunity to present 5 minutes of oral argument has been requested via motion but at this writing has not been acted upon.

## TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES.....	ii
QUESTION PRESENTED FOR REVIEW .....	iv
THE INTERESTS OF AMICUS .....	1
ARGUMENT .....	8
I. APPELLEE IS A CRIMINAL WRONGDOER .....	8
A. The Appropriate Standard of Review.....	8
B. Analysis .....	8
II. EQUITY SHOULD NOT REWARD A CRIMINAL WRONGDOER.....	12
A. The Appropriate Standard of Review.....	12
B. Analysis .....	12
CONCLUSION AND RELIEF SOUGHT.....	17

## INDEX OF AUTHORITIES

	<u>Page</u>
 Cases	
<i>Alexander v Neal</i> , 364 Mich 485; 110 NW 797 (1961) .....	14
<i>Barbour v Handlos Real Estate &amp; Building Corp</i> , 152 Mich App 174; 393 NW2d 581 (1986) .....	12
<i>Charles Featherly Construction Co v Property Development Group, Inc</i> , 400 Mich 198; 253 NW2d 643 (1977) .....	12
<i>Parker v McQuade Plumbing &amp; Heating, Inc</i> , 124 Mich App 469; 335 NW2d 7 (1983) .....	12
<i>Republic Bank v Modular One LLC</i> , 232 Mich App 444; 591 NW2d 335 (1998) .....	1, 13
<i>Reynolds v College Park</i> , 63 Mich App 325; NW2d (1975) .....	14
<i>Stachnik v Winkel</i> , 394 Mich 374, 382; 230 NW2d 529 (1975) .....	15
<i>Tracer v Bushre</i> , 381 Mich 282; 160 NW2d 898 (1968) .....	12
<i>Utica Equipment Co v Ray W Malow Co</i> , 204 Mich App 476; 516 NW2d 99 (1994) .....	12
 Statutes	
MCL 2411(2)(a)-(m) .....	6
MCL 2412 .....	13
MCL 339.101 et seq .....	1
MCL 339.601(1)(3)(4) .....	13
MCL 339.601(3)(4) .....	9
MCL 339.604 .....	6
MCL 339.1019 .....	3
MCL 339.2403 .....	8
MCL 339.2411(2) .....	5
MCL 339.2412 .....	2

MCL 339.2501 et seq. .... 3

MCL 570.1101 *et seq.* .... 8

MCL 570.1103(5)..... 8

Rules

MCR 7.215(I) ..... 1

## QUESTION PRESENTED FOR REVIEW

- I. Section 2412 of the Occupational Code plainly prohibits unlicensed contractors from bringing and maintaining an action for collection of compensation for work or services performed while unlicensed. Section 601 of the Code makes it a crime to perform work or services while unlicensed. Over the years, there has arisen in the Court of Appeals a line of authority which has permitted recovery to unlicensed contractors based on equitable considerations. That line of authority failed to consider the criminality of the conduct and thus failed to apply the clean hands doctrine which holds that equity will not aid a criminal wrongdoer. Should that line of authority be continued?

## THE INTERESTS OF AMICUS

Amicus Curiae, Andrew L. Metcalf Jr., is the Director of the Bureau of Commercial Services [BCS], which is an agency of State government [p/k/a Department of Licensing and Regulation, f/k/a Department of Commerce, Bureau of Occupational and Professional Regulation, and Office of Commercial Services] housed within the Department of Consumer and Industry Services [DCIS], a principal department of State government. He was granted *Amicus Curiae* status in the Court of Appeals in this matter and filed a brief substantially similar in all respects to the instant brief. *Amicus* also presented oral argument below. The issues raised in the brief of *Amicus* below and the oral arguments made to the Court of Appeals provided the jurisprudential rationale for the unanimous decision of the Court of Appeals that the line of authority which culminated in *Republic Bank v Modular One LLC*, 232 Mich App 444; 591 NW2d 335 (1998) was in error. While it was the unanimous view of the panel below that the position of *Amicus* was correct, the panel was constrained by MCR 7.215(I) to apply the decision in *Republic Bank* and thus held that the unlicensed contractor must be permitted to recover under the circumstances of this case.

One of the primary responsibilities of the BCS is the administration of Michigan's Occupational Code [Code], MCL 339.101 et seq. The administration consists of two principal parts. The first pertains to the licensure of persons practicing the several occupations<sup>2</sup> which are regulated under the Code, the second pertains to the administrative enforcement of the Code

---

<sup>2</sup> There are 16 occupational or professional areas currently requiring licensing or registration under the Code, including the occupations of residential maintenance and alteration salesperson and residential maintenance and alteration contractor. While these are the two separate, albeit related, occupations involved in the case in chief, as will be presented in more detail below, they are not the only occupations regulated by the Code which are impacted by the line of appellate authority with which *Amicus* is concerned.

against those who violate it. The overall administrative scheme of enforcement contemplated by the Code provides for complaints to be filed by citizens/consumers [or the agency itself] and penalties to be assessed against licensees who commit violations, including fines and revocation of licenses. The first of the two principal provisions of the Code here at issue is section 2412:

Sec. 2412. A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.

MCL 339.2412

The controlling decision in *Republic Bank* and the line of appellate authority on which it is based permits a person to secure an economic benefit from engaging in conduct that the second principal provision of the Code with which *Amicus* is concerned [section 601 *infra*] defines as criminal, i.e., negotiating and making a residential construction contract without a license, and performance of work or services pursuant to such a contract without a license. *Amicus* believes that both the decision below and the line of appellate authority on which it is premised are contrary to the plain meaning of the language in the statute [as reflected in the above cited section of the Code]; the public policy which that plain language was designed to promote; principles of equity [the clean hands doctrine]; and controlling judicial precedent. All of these factors mitigate against application of equity to reward a criminal wrongdoer [see argument I below] such as Appellee.

The interest of *Amicus* in preventing recovery of money based on the practice of an occupation without a license is not limited merely to the occupations of residential builder and maintenance and alteration contractor. Section 601 of the Code classifies unlicensed activity in all the regulated occupations as criminal conduct. Thus, decisions such as the one below that grants equitable relief to a contractor, could easily be extended to permit recovery to at least 8 other classes of persons practicing occupations that require licensure under the Code who may

acquire and or assert lien rights in real property [Architects, Engineers, Land Surveyors under Article 20, 3 types of Real Estate Appraisers under Article 27, Real Estate Brokers, Real Estate Salespersons under Article 25] and who, under the authority of the decision below and others like it, may be permitted to secure compensation for services rendered even though not licensed. But for the line of authority relied upon by the trial court and the decision that dictated the outcome of the instant matter in the Court of Appeals [*Republic Bank*], lack of proper licensure would at least imply that the 8 categories of potential lien holders [plaintiffs or counterclaiming defendants in a lien foreclosure or quiet title action] would be denied recovery or set off because the activity that would give rise to the filing of a lien is also criminal in nature by virtue of section 601 *infra*.

Moreover, in addition to section 2412, the Code has two other provisions that specifically prohibit bringing and maintaining actions for collection of compensation using virtually identical language as follows:

Sec. 1019. A personnel agency, or any licensed agent or other agent or employee of a personnel agency shall not do any of the following:

(b) Bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for services as a personnel agency without alleging and proving that the agency and its agent were licensed under this article during the performance of the act or contract.

MCL 339.1019

Sec. 2512a. A person engaged in the business of, or acting in the capacity of, a person required to be licensed under this article, shall not maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article at the time of the performance of the act or contract.

MCL 339.2512a<sup>3</sup>

---

<sup>3</sup> Article 25 of the Code applies to real estate brokers and salespersons. MCL 339.2501 et seq.



*Amicus* believes that denial of recovery or set off to an unlicensed contractor [as well as to persons practicing the several other occupations regulated by the Code] is in the public interest. Requiring licensure ensures the full panoply of remedies intended by the legislature will be available and serves to maximize the protections afforded to the public by the licensing law. This is so because the administrative complaint remedies provided in the Code against licensees are much broader than those provided against non licensees and thus the protections afforded to the consumer by the administrative remedies are made more available. In specific reference to contractors, §2411 of the Code specifically relates exclusively to licensees (or applicants for licensure) and contains a panoply of activity for which only licensees may be held accountable.

(2) A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article 6:

- (a) Abandonment without legal excuse of a contract, construction project, or operation engaged in or undertaken by the licensee.
- (b) Diversion of funds or property received for prosecution or completion of a specific construction project or operation, or for a specified purpose in the prosecution or completion of a construction project or operation, and the funds or property application or use for any other construction project or operation, obligation, or purposes.
- (c) Failure to account for or remit money coming into the person's possession which belongs to others.
- (d) A willful departure from or disregard of plans or specifications in a material respect and prejudicial to another, without consent of the owner or an authorized representative and without the consent of the person entitled to have the particular construction project or operation completed in accordance with the plans and specifications.
- (e) A willful violation of the building laws of the state or of a political subdivision of the state.
- (f) In a maintenance and alteration contract, failure to furnish to a lender the purchaser's signed completion certificate executed upon completion of the work to be performed under the contract.

(g) If a licensed residential builder or licensed residential maintenance and alteration contractor, failure to notify the department within 10 days of a change in the control or direction of the business of the licensee resulting from a change in the licensee's partners, directors, officers, or trustees, or a change in the control or direction of the business of the licensee resulting from any other occurrence or event.

(h) Failure to deliver to the purchaser the entire agreement of the parties including finance and any other charge arising out of or incidental to the agreement when the agreement involves repair, alteration, or addition to, subtraction from, improvement of, wrecking of, or demolition of a residential structure or combination of residential and commercial structure, or building of a garage, or laying of concrete on residential property, or manufacture, assembly, construction, sale, or distribution of a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing.

(i) If a salesperson, failure to pay over immediately upon receipt money received by the salesperson, in connection with a transaction governed by this article to the residential builder or residential maintenance and alteration contractor under whom the salesperson is licensed.

(j) Aiding or abetting an unlicensed person to evade this article, or knowingly combining or conspiring with, or acting as agent, partner, or associate for an unlicensed person, or allowing one's license to be used by an unlicensed person, or acting as or being an ostensible licensed residential builder or licensed residential maintenance and alteration contractor for an undisclosed person who does or shall control or direct, or who may have the right to control or direct, directly or indirectly, the operations of a licensee.

(k) Acceptance of a commission, bonus, or other valuable consideration by a salesperson for the sale of goods or the performance of service specified in the article from a person other than the residential builder or residential maintenance and alteration contractor under whom the person is licensed.

(l) Becoming insolvent, filing a bankruptcy action, becoming subject to a receivership, assigning for the benefit of creditors, failing to satisfy judgments or liens, or failing to pay an obligation as it becomes due in the ordinary course of business.

(m) Poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official.

MCL 339.2411(2) [emphasis added]

Section 604 on the other hand applies to persons [not simply to licensees] and subjects them to penalties under much more limited kinds of conduct.

Sec. 604. A person who violates 1 or more of the provisions of an article<sup>4</sup> which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 602:

- (a) Practices fraud or deceit in obtaining a license or registration.
- (b) Practices fraud, deceit, or dishonesty in practicing an occupation.
- (c) Violates a rule of conduct of an occupation.
- (d) Demonstrates a lack of good moral character.
- (e) Commits an act of gross negligence in practicing an occupation.
- (f) Practices false advertising.
- (g) Commits an act which demonstrates incompetence.
- (h) Violates any other provision of this act or a rule promulgated under this act for which a penalty is not otherwise prescribed.
- (i) Fails to comply with a subpoena issued under this act.
- (j) Fails to respond to a citation as required by section 555.
- (k) Violates or fails to comply with a final order issued by a board, including a stipulation, settlement agreement, or a citation.

MCL 339.604 [emphasis and footnote added]

Thus, a licensee who violates any of the specific provisions of § 2411(2)(a)-(m) will be subject to administrative penalties and sanctions as provided in Article 6 while a non licensed person will only be subjected to those penalties if they engage in conduct that is proscribed by section 604. The existence of the administrative remedies, not the least of which is that the consumer

---

<sup>4</sup> Insofar as §2411(2) provides that it is only a "licensee" who may be penalized for engaging in the conduct proscribed in (a)-(m), it has been the longstanding practice of Amicus not to administratively charge a non licensee who engages in such conduct with a violation of any of those provisions. Rather, a non licensee may only be charged if the facts reveal a violation of the conduct described in §604.

does not have to hire an attorney to file civil suit and can engage the licensing leverage of the State in order to achieve a resolution of a complaint, is diminished to the extent a consumer loses that leverage when dealing with a non licensee.

Under the decision below and the current line of authority on which it is based, a contractor can rest assured that even without a license, any work performed will be compensated just as soon as the homeowner gets around to needing a clear title and is compelled to bring an equitable action to obtain one. The homeowner is thus forced to incur legal costs and fees in virtually all cases since actions to quiet title must be filed in circuit court. Although in this particular matter it is the contractor cross appellant Millen Roofing who is claiming that it is the victim of a litigious and cunning homeowner, the current line of cases permit if not invite a situation in which innocent homeowners can be held hostage to liens filed by bad contractors whom they may have fired or who have refused to stand behind their work.

## ARGUMENT

### I. APPELLEE IS A CRIMINAL WRONGDOER

#### A. The Appropriate Standard of Review

It is respectfully submitted that in view of the admitted facts, the question of whether Appellee has committed acts violative of the criminal law is one of law and accordingly may be reviewed *de novo*.

#### B. Analysis

In view of the undisputed facts in this case, the following legal conclusions may be drawn. First, Defendant Millen was a contractor within the meaning of section 103(4) of the Construction Lien Act MCL 570.1101 *et seq* that defines contractor as someone who "pursuant to a contract with the owner ... of real property, provides an improvement..." MCL 570.1103(5). Second, insofar as the record does not establish that Millen is entitled to claim the exemption provided within section 2401(d), Millen's agent was also acting as a residential maintenance and alteration **salesperson** within the meaning of MCL 339.2401(d) when he or she **submitted the proposal to sell** the job (the bid) to Stokes [see Ex. D attached to Appellant's brief on application for leave to appeal]. Third, Millen was acting as a residential maintenance and alteration **contractor** within the meaning of MCL 339.2401(b) when it **performed** the job. That is to say, subject to certain exceptions not here at issue [see below], Michigan's Occupational Code requires licensure for both the "person" who performs the job [the contractor] and the "person" who bids or sells the job [the salesperson]. MCL 339.2403.

Fourth, and most significant to the position of Amicus, by virtue of section 601 of the Code, any person who engages in the practice of an occupation regulated by the Code without a license including but not limited to the occupations at issue in this case [Residential Maintenance and Alteration **Contractor**, and Residential Maintenance and Alteration **Salesperson**] is

engaging in criminal activity punishable by a fine of up to \$1,000.00 or one year in prison or both.

Sec. 601. (1) A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possesses a license or registration issued by the department for the occupation.

\*\*\*

(3) A person, school, or institution which violates subsection (1) or (2) is guilty of a misdemeanor, punishable by a fine of not more than \$500.00, or imprisonment for not more than 90 days, or both.

(4) A person, school, or institution which violates subsection (1) or (2) a second or any subsequent time is guilty of a misdemeanor, punishable, except as provided in section 707(2), by a fine of not more than \$1,000.00, or imprisonment for not more than 1 year, or both.

MCL 339.601(3)(4)

While Millen claims it is not covered by the licensing law [see page 8-13 of Millen's brief on appeal] or, alternatively, is exempted by virtue of section 2403 [see pages 13-17 of Millen's brief on appeal], the claims are not supported by any proper construction of the Occupational Code. Millen first asserts that Article 24 of the Code contains "no requirement for licensing" and concludes therefore that the language of section 2412 [i.e., "for which a license is required by this article...proving that the person was licensed under this article..." (emphasis added)] does not apply. Indeed, it must be observed that the same may be said of virtually all of the Articles 7-26 that apply to other occupations and professions i.e., they too contain no specific requirement for licensure. But the Occupational Code must be construed as a whole - not in a vacuum. Nor may it be construed in such way as to embarrass the legislation or render part of it nugatory [Millen's brief p.16]. Yet that is precisely what Millen's argument does. The construction advanced by Millen not only renders section 2412 a nullity, it also wipes out the licensing requirements for all the other occupations and professions in all the other articles of the Code as well!

The same holds true for the exemption claimed by Millen who cites section 2403(b) in support of the proposition that when a person [such as Millen] contracts with a homeowner [such as Stokes], it

... not only excuses Mrs. Stokes from obtaining a license but also takes Mrs. Stokes' whole 'project' outside the scope of Article 6.

[brf. on appeal, p. 15] [quotes in original] [underlining added]

Insofar as virtually all remodeling contracts are between a homeowner and a contractor, under Millen's construction of the exemption provided in section 2403(b) of the Code, virtually no projects would require a licensed contractor! Indeed, under the construction of the Code advanced by Millen, the entire Act vis a vis licensing requirements is a nullity either because no one needs a license or because no projects would be covered and the entire administrative machinery of government devoted all these years to the licensing and regulation of the occupations and professions in the Code has been unnecessary if not unlawful at least insofar as residential contractors are concerned.

Amicus represents to this Court that for purposes of its administration of the Occupational Code it has not in the past, nor would it in the future, permit Millen or others similarly situated an exemption under these facts under section 2403(b). Suffice it to say that Article 6 must be read in conjunction with each of the subsequent articles of the Code both to require licensure [or registration] in each of the articles which regulates an occupation or profession and to provide penalties and administrative remedies. Further suffice it to say the exemption from the licensing requirement in section 2403(b) cited by Millen obviously applies to a homeowner who physically performs his or her own construction work on his or own property where the property is actually used AND occupied by the homeowner. Given the overall structure of the Code, it cannot possibly be maintained that no licenses are required under the circumstances presented in this manner.

Thus, Millen was at all times pertinent hereto engaged in criminal activity under the Code and indeed Millen has engaged in at least one and possibly two separate albeit related criminal acts i.e., performing the job without a maintenance and alteration contractor's license and selling the job<sup>5</sup> without a salesperson's license, respectively.

---

<sup>5</sup> As noted earlier, the record does not reflect whether Millen would have qualified for an exemption from the salesperson's license under section 2401(d). That exemption depends on whether Millen's agent met the factual criteria in the section.



## II. EQUITY SHOULD NOT REWARD A CRIMINAL WRONGDOER

### A. The Appropriate Standard of Review

The application of equitable principles is a matter which is discretionary with the trial court and thus the scope of review is one of abuse of discretion.

### B. Analysis

The decision of the Court below permitted recovery to an unlicensed contractor based on the equitable maxim that "he who seeks equity, must do equity," i.e., insofar as the Plaintiffs Stokes [the property owners] sought, at least initially, a remedy that was in part equitable in nature [action to quiet title], principles of equity would require the property owners to do equity [pay the contractor for the value of the improvement rendered or allow the contractor to offset the value of those services against other claims]. Review of the decision below reveals that Millen was afforded relief in accordance with a line of appellate judicial authority interpreting §2412 *supra*, or its predecessor including the following: *Tracer v Bushre*, 381 Mich 282; 160 NW2d 898 (1968); *Charles Featherly Construction Co v Property Development Group, Inc*, 400 Mich 198; 253 NW2d 643 (1977); *Parker v McQuade Plumbing & Heating, Inc*, 124 Mich App 469; 335 NW2d 7 (1983); *Barbour v Handlos Real Estate & Building Corp*, 152 Mich App 174; 393 NW2d 581 (1986); *Utica Equipment Co v Ray W Malow Co*, 204 Mich App 476; 516 NW2d 99 (1994).

The decisions allowing recovery to an unlicensed contractor have almost uniformly held that in spite of the prohibitory language in §2412 of the Code *supra*, and in spite of substantively identical language in the predecessor statutes, an unlicensed contractor may indeed assert an equitable interest as a defense whenever a property owner brings an action seeking some kind of equitable relief, e.g., to quiet title or to remove a lien which the contractor had placed on the

property. The most recent in this line of cases is *Republic Bank v Modular One LLC, supra*, which, like the others before it, held that if a property owner wishes<sup>6</sup> to obtain the equitable relief he or she is seeking, he or she must in turn pay the contractor for the value of the goods and services rendered. This, in effect, was also the rationale of the trial court in the instant matter although, as mentioned earlier, by the time all the cross and counterclaims were disposed of, all that was left were two counterclaims made by the unlicensed contractor<sup>7</sup>.

The line of authority with which *Amicus* takes issue allowed equitable set offs based on the equitable maxim that one who seeks equity must do equity. From a purely common law analytical standpoint, this might be all well and good except that such a position disregards entirely not only the plain meaning of the statutory prohibition in §2412, it also disregards the fact that by virtue of his performance of the activity for which he has been awarded compensation by way of equitable set off, the Appellee was engaged in the commission of one or more criminal acts in violation of section 601 of the Occupational Code.

Sec. 601. (1) A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possesses a license or registration issued by the department for the occupation.

\*\*\*

(3) A person, school, or institution which violates subsection (1)... is guilty of a misdemeanor, punishable by a fine of not more than \$500.00, or imprisonment for not more than 90 days, or both.

(4) A person, school, or institution which violates subsection (1) or (2) a second or any subsequent time is guilty of a misdemeanor, punishable, except as provided in section 707(2), by a fine of not more than \$1,000.00, or imprisonment for not more than 1 year, or both.

MCL 339.601(1)(3)(4)

---

<sup>6</sup> Of course it is not as though the property owner has much choice but to start a lawsuit, especially where the unlicensed contractor has clouded title by filing a claim of lien.

<sup>7</sup> The trial court specifically noted that this matter would proceed as though the unlicensed contractor was the Plaintiff. Transcript dated May 4, 1998, p.3.

Study of the 7 applicable cases cited in the annotations to MCL 339.2412 as well as those cases cited by the Appellee and Appellant suggest how the decisions of the courts came to deviate from the earliest reported decision applying the statutory prohibition contained in the predecessor to current §2412.

*Alexander v Neal*, 364 Mich 485; 110 NW 797 (1961) appears to be the first case to apply the language which later found its way into the Code as §2412. There, the Court began its analysis by first specifically noting that the same section of the law which prohibited unlicensed activity also provided that such activity was a crime:

Under the same section of the act, a violator may be subjected, also, to a criminal penalty....The police power is thus employed to protect the public ....

id at 487 (emphasis added)

The Court then immediately referred to the express prohibition against maintaining an action to collect compensation for services rendered and went on to hold that as a matter of legal principle:

Even where the statute contains no such express prohibition, the courts frequently deny recovery on the ground that 'a contract made in violation of a police statute enacted for public protection is void and there can be no recovery thereon.'

id 487 [quotation in original, citation and footnote omitted]

Analysis of the decisions in the cases cited in the annotations makes it clear that with the exception of *Reynolds v College Park*, 63 Mich App 325; 234 NW2d 507 (1975)<sup>8</sup>, and two others which are similarly distinguishable [*Kirkendall v Heckinger*, 403 Mich 371, 304 NW2d

---

<sup>8</sup> This case is not on point because ultimately the court held that the Residential Builder's Act "does not apply" to the circumstances of the case. *id* at 331.

699 (1978); *Green v Ingersoll*, 89 Mich App 228, 280 NW2d 496 (1979)<sup>9</sup>, not a single mention is made of the fact that the activity in which the unlicensed contractor was engaged [making a contract, and performing the contract] constitutes criminal activity. *Amicus* postulates that the failure may be the result of the fact that when the Occupational Code was enacted in 1980, the legislature separated the criminal provisions from the prohibition against recovery. Previously, as noted by the Court in *Alexander, supra*, both had been part of the same section of the act MCL 338.1516. The Code separated the provisions retaining the former in section 601, *supra*, and the latter in section 2412. The separation may have caused the criminal aspect of the conduct to be overlooked.

Irrespective of the cause, the significance of the absence of any notice of the fact that the conduct constituted criminal activity lies in the omission of those courts to apply the fundamental, and in this matter controlling, equitable doctrine of clean hands. In other words, analysis of the cases reveals that there is a common theme in all the cases which permit an unlicensed contractor to achieve a set off or equitable relief despite their unlicensed status. The theme is that the property owner Plaintiff who is seeking equity must do equity.

*Amicus* believes the line of authority that permits recovery or set off to an unlicensed contractor based on equitable principles never considered the issue of the criminality of the behavior and thus also failed to consider and apply the associated equitable doctrines that require that a person seeking equity must have clean hands and that equity will not reward a criminal wrongdoer. *Stachnik v Winkel*, 394 Mich 374, 382; 230 NW2d 529 (1975) Accordingly, the

---

<sup>9</sup> Both of these cases mention the criminal aspect of the conduct but are distinguishable from the rest in that allowance of recovery was based on **facts** that established that in addition to having supplied materials and labor to improve the property, each unlicensed contractor did so at a time when they already held a mortgage interest in the property. Both courts held it would be unfair to foreclose that interest as a set off simply because the contractors were also unlicensed. *Amicus* has no problem with the rationale for either of those rulings and does not believe that the decision that it seeks in this matter should have any effect on those holdings.

application of the equitable principles on which relief has been granted over the years since *Alexander* to unlicensed contractors was inappropriate.

## CONCLUSION AND RELIEF SOUGHT

Permitting unlicensed contractors to secure compensation for work performed in violation of the Occupational Code and thus to reward activity that has been criminalized by the legislature is contrary to public policy and the welfare of the people of the State. It puts the courts in a position of aiding and abetting a criminal wrongdoer. *Amicus* surmises that the structural changes to the statutes made after *Alexander* that moved the criminal provisions from where it was placed when the court found it in *Alexander* caused some of the other courts not to notice it at all. There is no other way to account for the failure to apply the clean hands doctrine. Whatever the reason, to continue to apply the previously selected equitable maxims to permit recovery to an unlicensed person without taking into account other applicable equitable principles of equal if not controlling significance is contrary to reason and the history of equitable jurisprudence.

*Amicus* is not concerned with the specific position of the contractor in this matter per se. Rather, the general issue which is of great concern to *Amicus* is whether he, and by extension of the principles in *Republic Bank*, others similarly situated, should be permitted recovery despite clear intent of the legislature and the public interest. Clearly there are negative consequences to the public's interest that arise from the line of authority that permits recovery in these kinds of matters. Accordingly, *Amicus* asks that the decision of the Court of Appeals in *Republic Bank* be reversed and that no award be permitted to the unlicensed contractor.

Respectfully submitted,

JENNIFER M. GRANHOLM  
Attorney General

Thomas L. Casey (P24215)  
Solicitor General  
Counsel of Record



---

Michael A. Lockman (P16748)  
Assistant Attorney General

Attorneys for *Amicus Curiae*  
Cadillac Place  
3030 W. Grand Boulevard, Suite 10-200  
Detroit, MI 48202

Date: January 30, 2002  
Amicus.Stokes.hjw